IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.865 OF 2005.

The Oriental Insurance Co. Ltd.: Appellants.

versus

Smt.Jayashree Arvind Jagdale

& ors. : Respondents.

Mr.R.S.Datar for the appellants.

Mr.S.M.Oak for Respondent No.1.

Mr.J.M.D'Silva for Respondent No.4.

CORAM : D.G.DESHPANDE,J.

DATED : 14th September 2005.

ORAL ORDER :-

1. Heard advocates for the appellant and respondents. This appeal arises out of an order passed by the Commissioner for Workmen's Compensation, Thane awarding compensation of Rs.1,97,060/-.

2. Respondent Nos.1,2 and 3 are the original claimants. A claim petition was originally filed by Arvind Shrimant Jagdale contending that he was employed by Opponent No.1. On 13.6.1999 he went on motor cycle owned by the opponent No.1 and the motor cycle slipped; he suffered serious injuries and he became totally lame and since the accident occurred during the course of employment while he was returning from his duty, he filed the claim petition.

3. Thereafter, i.e. after filing the claim petition, original applicant Arvind Jagdale died because of brain injury sustained by him in the said accident. His legal heirs are brought on record and they claimed Rs.2,35,472/- under Section of the Workmen’s Compensation Act, 1923. Opponent No.1 who was the employer did not file his written statement but he supported the case of the claimants that the deceased Arvind was so employed by him; that the age of deceased was 35 years and he was drawing salary of Rs.2000/- per month. Insurance Company the present appellant raised different defences denying each and every allegations and also mainly contended that the

policy of insurance was not covering risk of deceased Arvind.

4. The Commissioner for Workmen's Compensation, after considering the evidence on record, awarded compensation and hence this appeal filed by the Insurance Company.

5. Only one submission was made by the advocate for the Insurance Company and according to him, the policy did not cover cases under the Workmen's' Compensation Act. The advocate for the Insurance Company contended that the application could have been made under the Motor Vehicles Act but not under the Workmen's' Compensation Act and the policy did not cover the risk of the driver. Mr.Datar, appearing for the Insurance Company, also tendered a certified copy of the policy of the said vehicle during the course of arguments.

6. On the other hand, the advocate for the respondent contended that the policy did cover the deceased and secondly, Section 147 of the Motor Vehicles Act will prevail over the so called contract between the Insurance Company and

the owner of the vehicle even if it is accepted for the time being that the policy did not cover the cases under the Workmen's' Compensation Act. He also relied upon Section 167 of the Motor Vehicles Act which gives option to lodge claim under either of the Acts i.e. Motor Vehicles Act or Workmen's' Compensation Act and contended that if this option is exercised by the claimant and the claim petition is filed under the Workmen's' Compensation Act there is no legal bar in doing so and the Commissioner is justified in awarding the compensation.

7. At the outset it has to be stated that the judgment nowhere shows that, the policy now tendered by the advocate for the appellant across the table during the course of arguments, was forming part of the record of trial Court. There is no reference to the policy in the said judgment. Nothing otherwise is shown by the counsel for the appellant in this regard that the policy was actually filed before the Commissioner. No deposition of any witness is read over by the counsel for the appellant in this regard. Therefore, it is doubtful whether this policy was tendered or filed before the

Commissioner. If it is not so tendered then at the appellate stage it cannot be looked into unless there is an application under the relevant provision of the Civil Procedure Code for permission to tender it at the appellate stage and proper case in that regard is made out.

8. Even if for the sake of arguments the policy is perused and looked into. It is issued to Mr.Ram Baburao Salvi - original Opponent No.1 in respect of motorcycle in question. There is Driver Clause which states as : Persons or classes of persons entitled to drive : Any person including the insured provided that the person driving holds an effective and valid driving licence to drive the category of vehicle insured hereunder ..... provided also that a person holding an effective and valid Learner's License to drive the category of vehicle insured hereunder may also drive the vehicle and that the person satisfies the requirements of Rule 3 of the Motor Vehicle Act, 1989" This clause nullifies the contentions of the appellant that the driver is not covered under the policy.

9. Counsel for the appellant relied upon the

judgment of the Supreme Court reported in **2005 Lab.I.C.1865 [National Insurance Co.Ltd. v. Prembai Patel & ors.]**. In that case, the Respondent No.2, Chiman Patel was the owner of a truck and it was insured with the National Insurance Company Ltd. for the period 18.1.1993 to 17.1.1994. The deceased Sunder Singh was employed by him as a driver of the said truck. The driver died in an accident. His heirs filed a claim petition under section 166 of the Motor Vehicles Act, 1988. The Motor Accident Claims Tribunal, Bilaspur dismissed the claim petition holding the driver as responsible for the accident. The Claimants preferred an appeal before the High Court and, the High Court allowed the petition and awarded compensation of Rs.2,10,000/-. Therefore, the matter went to the Supreme Court only on one ground that having to the insurance policy taken by the owner of the vehicle and provisions of sections 147 and 149 of the Act, the liability of the Insurance Company is restricted to the Workmen’s Compensation Act and they were not liable to satisfy the entire award made in favour of the claimants. In that case, the policy as noted by the Supreme Court was the policy for Act i.e. Act Liability

Policy. Therefore, question was for interpretation of word "Act Liability" and as a result, the Supreme Court after considering the provisions of Sections 147 and 149 of the Act, held as the effect of this provision is that the insurance police which covers only liability arising under the Workmen’s Compensation Act in respect of a death or badly injured to such an employee is valid and permissible but it is confined to the liability arising under the Workmen’s Compensation Act. Ultimately, the Supreme Court permitted the Insurance Company to recover the amount which was in excess of its liability under the Workmen’s Compensation Act from the owner of the vehicle in accordance with law.

10. The question is , whether this case of the Supreme Court is of any help to the appellant. I have already held that nothing was shown to me that this policy of insurance, now tendered by the counsel for the appellant during the course of arguments, was tendered before the trial Court. But for the sake of arguments this policy is considered. It is not an Liability for Act or Act Liability. In One of the columns of

the Policy it is stated as A) Own Damage - Basic Add: Own Damage - Surcharge and in other column B) Liability to Public - Basic Add : . The Policy runs into one page only and nowhere it is stated that it is an Act Liability Policy and in the limitation clause what is written is as "Use only for social, domestic and pleasure purpose and insured own business." Therefore, there is nothing in this policy to show that it is an Act Liability Police. Opponent No.1 has admitted that the deceased was employed by him and on the date of accident it was engaged for doing the business of opponent No.1. Therefore, all the clauses of the police squarely applies to the facts of the case. It is not necessary to consider the provisions of Motor Vehicle Act relied upon by the respondents. Therefore, there is no merit in this appeal. The appeal is dismissed with costs.

[D.G.DESHPANDE,J]